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IN THE

Supreme Court of the United States

October Term 1968

No. 65

TIMOTHY F. LEARY,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The Government's construction of the Marihuana Tax Act is erroneous. The Act requires all proposed marihuana transferees, including persons whose proposed possession is likely to be unlawful to obtain an order form and pay the transfer tax.

The Government has unequivocally taken the position that the Marihuana Tax Act constitutes a *complete prohibition* upon the acquisition of marihuana by unregistered persons — those whose proposed possession is likely to be illegal. According to the Government, such persons cannot obtain an order form, cannot prepay the tax and cannot in any manner legitimize their acquisition of marihuana. This position is contrary to the express language and legislative history of the Marihuana Tax Act.

The Government asserts that, by construing the Marihuana Tax Act "*in pari materia*" with the Harrison Anti-Narcotics Act of 1914, it has "developed a policy" of refusing to issue order forms to, and accepting payment of the transfer tax from, persons whose intended activities would be illegal (pp. 16, 17).

A comparison of the Marihuana Tax Act with the earlier Harrison Act clearly proves that proposed illegal possessors of marihuana *must* obtain an order form and prepay the tax and proposed illegal possessors of the Harrison Act narcotics are expressly *prohibited* from obtaining an order form or paying the tax. Subdivision (f) of the Harrison Act (26 U.S.C. § 4705) provides that the Secretary of the Treasury "shall require that [written order forms] be sold only to persons who have registered and paid the special tax. . . ." The Marihuana Tax Act requires that every person "whether or not required to pay a special tax and register" obtain a written order form (§ 4742(a)).

The legislative history of the Marihuana Tax Act makes it clear beyond question that Congress intended to reach these totally opposite results. The Treasury Department, as sponsor of the act, through Clinton M. Hester, stated to the House Committee considering the bill:

> We have departed from the Harrison Narcotic Act in one major respect, and we have done that because the Ways and Means Committee departed from the plan of the Harrison Act in preparing the National Firearms Act.
>
> Under the Harrison Narcotic Act no one can buy narcotics unless he has registered and paid the occupational tax. In the National Firearms Act the committee did not follow that plan. Anyone is permitted to buy a machine gun or a submachine gun, but he must pay a $200 transfer tax, and carry out the purchase on an official order form.

The focal point of attack on the Harrison Narcotic Act by the judges who dissented in the *Doremus case* and the *Nigro case,* was that the provision of the act which limited the persons to whom narcotics could be sold clearly indicated that the primary purpose of the act was not to raise revenue but to regulate matters which were reserved to the States under tenth amendment.

Mr. Vinson: How did the Court stand in those cases?

Mr. Hester: In the first case the Court stood 5 to 4, and in the second case the Court stood 6 to 3.

Mr. McCormack: What was the firearms case?

Mr. Hester: The firearms case involved only the occupational tax under the Firearms Act.

Mr. McCormack: Was that decision unanimous?

Mr. Hester: Yes; that was a uninamous decision. That is the decision of March 29. In the Firearms Act you arranged it so that anybody can buy a machine gun but he must pay a transfer tax of $200 and would have to use an order form.

We have looked into the records in connection with the transfer tax in the Firearms Act, and we found that only one machine gun was purchased at $200 last year.

Mr. Dingell: Legitimately?

Mr. Hester: Yes. This bill would permit anyone to purchase marihuana, as was done in the National Firearms Act in permitting anyone to buy a machine gun, but he would have to pay a tax of $100 per ounce of marihuana and make his purchase on an official order form. A person who wants to buy marihuana would have to go to the collector and get an order form in duplicate, and buy the $100 tax stamp and put it on the original order form there. He would take the original to the vendor, and keep the duplicate. If the purchaser wants to transfer it, the person who purchases the marihuana

> from him has to do the same thing and pay the $100 tax. That is the scheme that has been adopted to stop high-school children from getting marihuana. . . .
>
> [T]his bill, like the National Firearms Act, departs from the plan of the Harrison Narcotic Act which limits the right to purchase narcotic drugs to those persons who are permitted to register under that act. This limitation was the focal point of attack against the constitutionality of the Harrison Narcotic Act in the case of *Doremus* v. *United States, supra*, and *Nigro* v. *United States* (1927) (276 U.S. 332). In the latter case, the minority of the court expressed the view that this provision in the Harrison Narcotic Act, which limited the persons entitled to purchase narcotic drugs, was unconstitutional on the ground that it manifested an intention on the part of the Congress to regulate a subject matter reserved to the States under the tenth amendment.
>
> Thus, in order to obviate the possibility of a similar attack upon the constitutionality of this bill, it, like the National Firearms Act, permits the transfer of marihuana to nonregistered persons upon the payment of a heavy transfer tax. The bill would permit the transfer of marihuana to anyone, but would impose a $100 per ounce tax upon a transfer to a person who might use it for purposes which are dangerous and harmful to the public, just as the National Firearms Act permits a transfer of a machine gun to anyone but imposes a $200 tax upon a transfer to a person who would be likely to put it to an illegal use.
>
> Although the $100 transfer tax in this bill is intended to be prohibitive, as is the $200 transfer tax in the National Firearms Act, it is submitted that it is constitutional as a revenue measure." (Hearings on H.R. 6385 before the Committee on Ways and Means; 75th Cong., 1st Sess. at 9, 14 (1937))

In light of the express statutory language of the Marihuana Tax Act requiring written order forms for all transfers and the legislative history clearly mandating that interpretation, it is submitted that no "policy" of the Gov-

ernment nor regulations, can overcome the clear Congressional command.

In any event, the proposition that since 1937 the Government has had a "policy" of prohibiting acquisition of marihuana by proposed illegal possessors is seriously open to question. The Government has never published this policy in any form, and, according to the Government it has never had occasion to effectuate this policy. The Government states: "The Internal Revenue Service has advised us, since it has no record that there has *ever* been such an application by a non-registrant, the Service has never formulated a policy in the form of a regulation or operating procedure for processing such application." (Government Brief, p. 16, Note 16.) Thus the "policy" is apparently a contingent, abstract and unenunciated one. The Government had an opportunity to enunciate this policy in the Court of Appeals in this matter (and presumably in other matters) and never did so. Indeed, as pointed out in the *Amicus Curiae* Brief of the American Civil Liberties Union (pp. 11-13), in 1950 the Government took a position before this Court directly contrary to their instant "construction" of the Marihuana Tax Act. In its brief in *United States* v. *Sanchez,* 340 US 42 (1950) the Government stated:

> If it had seen fit to do so, Congress could have imposed an absolute prohibition, enforceable by criminal penalties, upon transfer of marihuana to unregistered persons. . . . That Congress chose instead to impose a $100 tax, which would not only accomplish the same result but also provide an additional source of revenue, does not alter the essential validity of its action as an exercise of the taxing power." (pp. 27-29).

The Marihuana tax regulations in no way alter the result. The regulations do not expressly or impliedly prohibit the issuance of order forms to unregistered persons.

In fact, the regulations are clearly consistent with the statutory requirement that unregistered persons must obtain an order form and pay the tax. The regulations provide that "the tax applies to every transfer . . ." (26 C.F.R. 152.61); that the tax is $1.00 for registrants and $100.00 for non-registrants (26 C.F.R. 152.62); and, most importantly, that the order form must show "the transferee's name, address, and *if registered* the registration number . . ." (26 C.F.R. 152.66) (italics supplied). The Government's entire argument as to consistent "administrative construction" is based solely upon the requirements for signing the application for an order form and comparing signatures—a mechanical matter. 26 C.F.R. § 152.67-152.68. It is submitted that the signing and comparison requirements were put into the regulations so that only a registrant could avail himself of the markedly lower $1.00 per ounce tax, and that absent proof of registration by signature comparison, the applicant for the order form is required to pay the $100.00 per ounce tax. Certainly the signature and comparison regulations cannot overturn the express statutory language, legislative history and other regulations, all of which clearly negate a complete prohibition on acquisition of marihuana by unregistered persons.

In 1956 the Treasury Department submitted a memorandum to Congress over the signature of W. Randolph Burgess, then Acting Secretary of the Treasury, stating that the Marihuana Tax Act was not a prohibitory statute. The memorandum was submitted in support of the Guam Organic Act of 1956, under which the Harrison Anti-Narcotic Act was made applicable to Guam and the Marihuana Tax Act was specifically made inapplicable to Guam. (See *Amicus Curiae Brief*, A.C.L.U., pp. 14-15). The memorandum stated, *inter alia*:

> It is evidently the intention to make applicable to Guam, all of the internal revenue *narcotic* laws and to give the administrative and enforcement authority under those laws in the island to appro-

> priate officers of the Guam Government, in line with the present plan of enforcement in Puerto Rico. The internal revenue *marihuana* laws, however, are not to be extended to Guam but control of marihuana in the island is to be accomplished by *prohibitory* measure set forth in section 23. This department approves this plan because there is now practically no medical need for marihuana and controlled legislation of the type set forth in section 24 *is much more desirable than legislation of the type of the Marihuana Tax Act.* [Italics supplied]. 1956 U. S. Code Cong. & Ad. News 4062, 4079.

The Government thus had two opportunities to enunciate its "policy"—in the *Sanchez* brief and in the Treasury memorandum—and in both the Government supported Petitioner's construction and negated its present position.

In summary, it is submitted that the Marihuana Tax Act does not prohibit the acquisition of marihuana by proposed illegal possessors, but, on the contrary, expressly and intentionally permits the transfer of marihuana to all persons—provided they obtain a written order form and pay the applicable transfer tax. The Government's strained statutory construction can only be interpreted as an admission by it that the requirement of an order form for proposed illegal possessors and their payment of the $100.00 per ounce tax is blatantly self-incriminatory.

The 21 U.S.C. § 176a Presumption Is Arbitrary and Unreasonable

The Government's Brief reviews the rather meager evidence presented to Congress prior to the passage in 1956 of the statutory presumption in 21 U.S.C. § 176a (pp. 36-37). The Government then states: "We are aware of no new evidence which would detract from the authoritative findings of Congress" (p. 38). Subsequent to the submission of the Government's brief, the United States District Court for the Southern District of New York, held that the statutory presumption contained in § 176a was partially

invalid and that the Government must prove—by evidence independent of the statutory presumption—that a defendant found in possession of marihuana had knowledge of its illegal importation. *U. S.* v. *Adams,* Frankel, *D.J.,* not yet officially reported, 67 CR 414. Upon the basis of evidence submitted by the Government and the defendants at an evidentiary hearing, the *Adams* Court made various findings which are of particular significance to the issuance before this Court. Its findings were as follows:

> Whatever its actual or possible uses, there is botanically but a single species of the plant. Despite the practically total end of licit cultivation, it continues to grow spontaneously or adventitiously in a substantial area of the world and, most interestingly for us, can grow in every State of the United States as well as Puerto Rico, Panama, and the Canal Zone. It spreads, grows, and reproduces itself without human attention . . . It is difficult or impossible for all but the most expert analysts using sophisticated techniques to determine whether any given sample of marihuana comes from this or some foreign country (pp. 6-7).
>
> Year after year the Bureau of Narcotics reports acreages of growth destroyed. The reports reflect that narcotics control must focus upon domestically grown marihuana as well as that smuggled in from abroad. In any single year, the amount of domestic growth thus destroyed could yield more marihuana than all that seized and destroyed by the Bureau and other enforcement agencies. And, of course, there are no figures for domestic growth which is not discovered and not destroyed except as this facet of the matter may be illuminated by the fact that the work continues annually with no apparent diminution over time.
>
> Both 'experts' of one kind or another and laymen are made conscious of the intensive concern of police officials over domestically grown marihuana as the 'raw material' for domestic use of this narcotic. In this and other ways there arises a widespread belief that the widely prevalent use of marihuana is sup-

plied in substantial measure by domestic growth. Professor Schultes reported truthfully his judgment (whether correct or not, it is scarcely possible to know) that the marihuana so widely grown everywhere in the United States is the source of that smoked by most users in this country (pp. 7-8)."

To summarize the general import for our purposes of the formal and informal record, we find:

(1) There is a respectable body of expert authority for the view that most marihuana found in this country has been smuggled in from a foreign country. There are respectable views to the contrary. Congress could reasonably have accepted the former view. But nobody can say with confidence how closely it accords with the facts.

(2) There is no reliable evidence showing the extent to which people 'know' or believe that most illicit marihuana is imported. Even police officers and other interested government agents are by no means necessarily possessed of knowledge or a belief like the one declared to be inferable from possession under §176a. See *Costello* v. *United States*, 324 F.2d 260, 263 (9th Cir. 1963), cert. denied, 376 U.S. 930 (1964); *United States* v. *Kapsalis*, 313 F.2d 875, 876 (7th Cir.), cert. denied, 374 U.S. 856 (1963). Insofar as 'common experience' may suggest an answer, it is that many people, perhaps a majority, users and non-users alike, believe that 'pot' 'is cultivated in vacant lots and other places' (Gonzales *et al., op. cit. supra*), which would account for its widespread use, regular and occasional, from the campus to the ghetto to the country club (pp. 9-11).

It is of interest, then, though by no means crucial, that the legislative history of the statutory inferences in § 176a, as described in a Government Memorandum of Law, 'is indeed meager.' There is no explanation or support of any kind in committee reports. During Senate hearings preceding the enactment, however, Harry J. Anslinger, the Commissioner of Narcotics, reported that 'most of the marihuana traffic in this country is fed from

Mexico. * * * I would say,' he continued, 'that over 90 percent of the cannabis that we have seized has been smuggled from Mexico where they have a very considerable problem themselves and have done a lot in the destruction of clandestine fields.' A Texas official estimated that two percent of the marihuana in his State was 'homegrown' while the rest came from Mexico. Other witnesses gave similar estimates relating to Texas, which is, as the Government implicitly acknowledges, not necessarily representative of the entire country with respect to the problem of smuggling across the Mexican border.

Beyond these 'meager' expressions there is nothing. Nobody appears to have paid the slightest attention to the separate element and additional inference respecting knowledge of importation. It was known then, as it is now, see, e.g., *Butler* v. *United States*, 273 F.2d 436, 438 (9th Cir. 1959), that marihuana, whatever its source, is liable to pass through many hands from grower to smoker. It could readily have been seen that beyond the smuggler and perhaps an early middleman, those found in 'possession' of marihuana were likely to be at a far remove from, and without knowledge of, the source. Yet it was and is possession alone which allows the whole gamut of statutory inferences, including the inference that the possessor knew of the illegal importation. And, of course, 'the jury must be satisfied, on knowledge as on all other elements, beyond a reasonable doubt.' *United States* v. *Llanes*, 374 F.2d 712, 716 n. 4 (2d Cir.), cert. denied, 388 U.S. 917 (1967). It is here, in this court's view, that the statutory inferences become 'strained' and 'arbitrary,' and thus invalid under the Due Process Clause. *Tot* v. *United States*, 319 U.S. 463, 467-68 (1943) (pp. 11-13).

After making the foregoing findings, the District Court held:

While it has not commonly been featured in the standard formulations (but see Mr. Justice Black, dissenting in *United States* v. *Gainey, supra* at 82, 83, 85-86), it is fitting to stress that our problem is

in the setting of a criminal prosecution. No authority in any relevant context has ever suggested that the statutory inference was intended, or may properly serve, to lighten the prosecution's burden of proof beyond a reasonable doubt. On the contrary, it is routine and standard practice under 21 U.S.C. §176a, as under §174, to instruct the jury (or to hold in a bench trial) that no conviction may be had unless the prosecution has proved *each element of the offense*—including importation *and* knowledge thereof—beyond a reasonable doubt. See, e.g., *United States* v. *Gibson*, 310 F.2d 79, 81 (2d Cir. 1962); *United States* v. *Peeples*, 377 F.2d 205, 211 (2d Cir. 1967); *United States v. Llanes*, 374 F.2d 712, 714, 716 (2d Cir. 1967). And so when we *allow* the drawing of an inference like the type here in issue, we must be telling juries (or ourselves as triers of fact) that the inference is one sustained by substantially more than a preponderance of the evidence, that the probability is far in excess of 50-50, that it is sufficient to warrant a reasonable man's being convinced "to a moral certainty" of the correctness of the inference. See, e.g., *United States* v. *Bilotti*, 380 F.2d 649, 654 (2d Cir.), *cert. denied*, 389 U.S. 944 (1967). (pp. 16-17).

There was no basis in 1956, and there is none today, for thinking it 'very likely' that people found in possession of marihuana 'know' it to have been imported. Whether or not most marihuana is imported, there is powerful evidence that enormous numbers of people, experts as well as laymen, 'know' a good deal (or even most) marihuana found in the United States is grown and harvested here. The statutory inference is written to embrace possession and possessors generally. It is not confined in place—e.g., to Texas or other border States. It is not limited as to prospective defendants—to users, or wholesalers, or even retailers. It reaches students, housewives, slum-dwellers, the schooled and unschooled, the naive and the sophisticated, everywhere and all alike. There is no need—and no solid basis—to suggest that a more confined version would be more nearly sustainable. It is enough that Con-

> gress has crossed a forbidden line by inadvertently announcing an 'arbitrary' and 'strained' and highly unlikely proposition about a supposedly general matter of fact.
>
> Insofar as §176a proclaims a statutory inference that one found in possession of marihuana knows it to have been illegally imported, the statute is unconstitutional because it denies due process. (pp. 19-20)

The District Court also specifically rejected the contention that it was more difficult for the Government to prove the origin of marihuana than for the defendant to prove this fact:

> Congress had (at least so far as it disclosed) no pragmatic basis whatsoever for supposing that a possessor of marihuana is any better equipped, or even as well equipped, as the government 'to trace back through one or a dozen hands to the person who originally grew the weed.' This court—which may perhaps be said to deal more intimately, week in and week out, with narcotics problems than most members of the Congress—cannot pretend not to know, judicially or otherwise, what it knows of 'connections' and 'pushers' and the other miscellaneous figures in the trade. There is powerful reason to *disbelieve,* rather than to believe, that random people found with marihuana could know (or, a fortiori, could prove) its ultimate source. . . . Suitable cases for 'presumptions' are those where the truth of the fact in question and the existence of evidence about it, is almost certain to be within the defendant's ken—as, for example, what he himself was doing near a still, *United States* v. *Gainey, supra,* how he himself came to be in possession of something, *Morrison* v. *California,* 291 U.S. 82, 91 n. 4 (1934), or whether he himself had a license or permit of a specified kind, *ibid.* Such instances are utterly unlike a requirement of 'going forward' concerning a chain of transfers linking unknown people at distant removes in a world of stealth and shadows. And it bears reemphasis that even relative ease of proof

(the 'corollary')—as, what the defendant was doing near a still—is not even reached where the controlling test of high probability (rationality) is unsatisfied. *United States* v. *Romano, supra.* (pp. 22-23)

In partially invalidating the § 176a presumption, *Adams* relied principally upon the subjective element of knowledge and apparently did not feel it necessary to treat the second subjective element of the crime: the "specific intent to defraud the United States". An examination of the legislative history of the statute indicates that Congress intended that this additional subjective element be significant. The Treasury Department commenting on the then proposed bill urged that the element be deleted. It stated: "It is suggested that the pharse 'with intent to defraud the United States' in the proposed section 1404 adds an unnecessary element to the crime without serving any other useful purpose, and it might therefore be deleted." S. Rep. No. 1997, 84th Cong., 2d Sess. p. 23 (1956). The "intent to defraud" element was not deleted, and consequently, it is inferable that Congress intended this element of the crime to be one which should not be inferred merely from the objective acts of a defendant, but rather one which would have to be specifically found by a jury. The statutory presumption in § 176a emasculates this separate element of the crime as much as it emasculates the element of knowledge of illegal importation.

The Government's contention that the statutory presumption was merely an alternative theory submitted to the jury does not prevent reversal of the conviction

The Government argues that whether or not the presumption is sustained by this Court, the conviction must be affirmed because there was other adequate evidence of guilt on the importation count. The Government refers to this other evidence as the "alternative theory" of guilt (pp. 31-35). The Government argues that because the

other evidence of guilt was so clear and compelling the trial court's charge to the jury with respect to the § 176a presumption may not have substantially affected the result and, hence, even if the Court invalidates the presumption, the Court should affirm the conviction.

This Court has recently rejected this contention. *United States* v. *Romano*, 382 U.S. 136, 138 (1965). In *Romano*, the Court held the statutory presumption of guilt of the crime of possession, custody and control of an illegal still arising from mere presence at an illegal still site to be unconstitutional. Before reaching the substantive issue the Court held:

> If we were reviewing only the sufficiency of the evidence to support the verdict on Count 1, that conviction would be sustained. There was, as the Court of Appeals recognized, ample evidence in addition to presence at the still to support the charge of possession of an illegal still. But here, in addition to a standard instruction on reasonable doubt, the jury was told that the defendants' presence at the still 'shall be deemed sufficient evidence to authorize conviction.' This latter instruction may have been given considerable weight by the jury; the jury may have disbelieved or disregarded the other 'evidence of possession and convicted these defendants on the evidence of presence alone. We thus agree with the Court of Appeals that the validity of the statutory inference in the disputed instruction must be faced and decided.

CONCLUSION

The judgment below should be reversed in all respects.

Respectfully submitted,

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